Dato' Seri Dr Ling Liong Sik v Krishna Kumar s/o Sivasubramaniam

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3(S2)-23-37 OF 2000
ARIFIN ZAKARIA J
9 FEBRUARY 2002

Civil Procedure — *Particulars — Application for further and better particulars — Statement of claim and statement of defence — Particulars may be sought only of matters arising from pleadings — Exercise of court's discretion — Particulars not to be granted of matters of evidence or inference drawn or substitute interrogatories — Whether court should allow application — Rules of the High Court 1980 O 18 r 12(3)*

Legal Profession — *Professional privilege — Communication between solicitor and client — Information on date and mode of client's instructions — Privilege applicable to communication for purpose of seeking legal advice — Whether extends to matters observed by solicitors in the course of his retainer*

The claim herein arose out of a letter written by the defendant to the plaintiff, which allegedly contained defamatory allegations ('the letter'). The defendant claimed that he was at all material times acting for one Dato' Soh Chee Wen ('the client'). The contents of the letter were published in the newspapers. Arising from the respective pleadings, the parties applied for further and better particulars pursuant to O 18 r 12(3) of the Rules of the High Court 1980. The plaintiff applied for the following further and better particulars in respect of the amended defence: (a) under para 4, the date when the client left the jurisdiction, the circumstances and reasons why the client had left the jurisdiction and the present address of the client; (b) under paras 6(a) and 6(b), the date and mode of the instructions and the location of the client at the time of the alleged conversation and instructions; (c) under para 6(h), the client's address and facsimile number to which the letter from the defendant's office was transmitted and the date and mode of the client's instruction to do so; (d) under para 6(1), the source of the alleged information or informant, the date of receipt of the alleged information and the position, status and relationship of Lee Chai Huat ('LCH') to the client. According to para 6(1) of the defence, the defendant had been informed that LCH had published the letter to the various newspapers. The defendant, on the other hand, applied for further and better particulars of the amended claim. In the plaintiff's amended claim, the plaintiff pleaded that: (a) the letter was read by the plaintiff's press secretary ('OBS') and the plaintiff's senior private secretary ('LLC') ('para 5.1(iva)'); (b) the defendant caused or otherwise facilitated the publication of the letter to various newspapers ('para 5.1(v)'); (c) the defendant had caused or facilitated the publication of the letter on the Internet website of 'Malaysiakini.com' ('para 5.1(vi)'); (d) the defendant, his agents and/

or servants had spoken to reporters from various newspapers regarding the letter ('para 5.1(vii)'); (e) the letter was sent and published in the press two days before the Malaysian Chinese Association's annual general meeting ('para 9(b)'); (f) the allegations in the letter were four years old and stale ('para 9(g)'); and (g) the defendant had acted recklessly and without caring for the truth of the defamatory allegations in the letter or unverified instructions from the client who had fled the country to avoid investigations and charges by the relevant authorities ('para 10(c)'). The particulars sought by the defendant were: (a) in respect of para 5.1(iva), particulars regarding the person who had allowed OBS and LLC to read the letter; (b) in respect of paras 5.1(v) and 5.1(vi), the time and place of each publication thereof, how and by what way the defendant was alleged to have caused or assisted in the publication of the letter and the identities of the persons to whom the letter had been circulated to and published; (c) in respect of para 5.1(vii), the reporters whom the defendant, his agents and servants had spoken to and the identities of the defendant's agents and/or servants; (d) in respect of para 9(b), the person by and to whom the letter had been sent; (e) in respect of para 9(g), the person who had made the allegations four years ago; and (f) in respect of para 10(c), the charges that had been or would be brought against the client.

Held:

(1) The principles governing particulars were that particulars may only be sought of matters arising from the pleading and that the discretion was with the court as to whether to grant an order of particulars. In addition, particulars would not generally be ordered in respect of matters of evidence or inference drawn or substitute interrogatories (see pp 286H–287A).

(2) The particulars sought for by the plaintiff in respect of para 4 of the amended defence were matters of evidence for the defendant to adduce to show whether he had taken reasonable steps to verify the instructions of the client. The circumstances and reasons for the client's absence from jurisdiction and the client's present whereabouts did not have any relevance to the present action. Accordingly, the plaintiff's application for particulars in respect of para 4 of the amended defence was rejected (see p 287F–G).

(3) The particulars sought for by the plaintiff in respect of paras 6(a) and 6(b) of the re-amended defence did not come within the ambit of legal and professional privilege as provided under s 126 of the Evidence Act 1950. The particulars sought for under those two paragraphs were relevant to the issue of verification of the truth of the letter of demand with the client. As such, the defendant was ordered to furnish to the plaintiff the particulars sought for thereunder (see pp 288G, 289C–D).

(4) In respect of the particulars sought for under para 6(h) of the re-amended defence, the defendant was prepared to give the address of the client's office and the facsimile number to which the letter was transmitted. Legal professional privilege only extended to communications for the purpose of seeking legal advice. It was limited to the information for and the content of any legal advice but it did not extend to matters observed by the solicitors in the course of his retainer. Accordingly, legal professional privilege did not extend to the date and mode of the client's instructions (see pp 289H, 290A–B).

(5) The particulars sought for in respect of para 6(1) of the re-amended defence were irrelevant to the issue herein and the question of how and from whom the defendant had obtained the information was a matter of evidence for the defendant to adduce at the trial (see p 290F–G).

(6) The particulars sought under para 5.1(iva) of the plaintiff's claim did not arise out of matters pleaded but rather out of the defendant's own averment. As such, the defendant's application for particulars arising under para 5.1(iva) of the amended claim was disallowed (see p 291E–F).

(7) The defendant was not entitled to the particulars sought for under para 5.1(v) of the amended claim. In the re-amended defence, the defendant did not deny the publication in the newspapers except that he did not know that the letter or news feature in respect thereof would be published in the print or electronic media. From the pleadings, it was obvious when the publication had taken place and the defendant had admitted that he had written the letter. It was a matter of evidence as to how the letter got into the hand of the newspapers concerned and it was certainly not for the plaintiff to furnish the particulars thereof (see p 292A–B).

(8) In respect of the particulars sought under para 5.1(vi) of the plaintiff's claim, the time and place of circulation were matters of evidence and therefore the plaintiff need not give the particulars. The defendant did not deny that he had written the letter, the only dispute was as to how the letter was published on 'Malaysiakini.com'. Again, this was a matter of evidence. As such, the defendant's application on matters arising under para 5.1(vi) was disallowed (see pp 293G, 294D).

(9) In so far as the plaintiff's pleading in para 5.1(vii) related to the defendant's agents or servants, the plaintiff properly ought to give particulars of the agents or servants and the reporters of the respective newspapers as it would be a difficult task for the defendant to prepare his defence without knowing who the relevant servants or agents were and the reporters to whom they were alleged to have spoken to (see p 294H–I).

(10) The particulars sought for in respect of para 9(b) of the plaintiff's claim were irrelevant for the purpose of para 9(b) as the facts pleaded therein were only to support the plaintiff's claim for exemplary damages (see p 295G–H).

(11) As for the particulars sought under para 9(g) of the amended claim, since the plaintiff had raised the matter in his pleading, it was fair that the plaintiff provide the particulars asked for to enable the defendant to prepare his case (see p 296C–D).

(12) The particulars sought by the defendant in respect of para 10(c) were highly relevant to the issue of the credibility of the client. If the client had in fact fled the country to avoid investigations, the defendant ought therefore to exercise more care in acting on the instructions of the client. This was relevant to the issue of whether the defendant had in the circumstances acted recklessly or without caring (see p 296H–I).

[Bahasa Malaysia summary

Tuntutan di sini berbangkit daripada sepucuk surat yang ditulis oleh defendan kepada plaintif, yang didakwa mengandungi dakwaan-dakwaan bersifat memfitnah ('surat tersebut'). Defendan menuntut bahawa beliau, pada setiap masa yang material, bertindak untuk seorang yang bernama Dato' Soh Chee Wen ('anakguam tersebut'). Kandungan surat tersebut telah diterbitkan di dalam akhbar. Berbangkit dari pliding masing-masing, pihak-pihak tersebut telah memohon untuk mendapatkan butir-butir selanjutnya dan yang lebih baik selaras dengan A 18 k 12(3) Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif telah memohon untuk mendapatkan butir-butir selanjutnya dan yang lebih baik berhubung dengan pembelaan terpinda tersebut: (a) di bawah perenggan 4, tarikh anakguam tersebut meninggalkan bidang kuasa itu, keadaan dan alasan-alasan mengapa anakguam tersebut meninggalkan bidang kuasa itu dan alamat semasa anakguam tersebut; (b) di bawah perenggan-perenggan 6(a) dan 6(b), tarikh dan cara arahan-arahan dan lokasi anakguam pada waktu arahan-arahan dan perbualan yang didakwa itu; (c) di bawah perenggan 6(h), alamat anakguam dan nombor faksimili kepada yang mana surat tersebut daripada pejabat defendan telah dikirimkan dan tarikh serta cara arahan anakguam untuk melakukan yang sedemikian; (d) di bawah perenggan 6(1), sumber maklumat atau pemberitahu yang didakwa, tarikh penerimaan maklumat dan kedudukan, taraf dan perhubungan Lee Chai Huat ('LCH') dengan anakguam tersebut. Menurut perenggan 6(1) pembelaan tersebut, defendan telah dimaklumkan bahawa LCH telah menerbitkan surat tersebut pada pelbagai surat khabar. Defendan, sebaliknya, telah memohon untuk mendapatkan butir-butir selanjutnya dan yang lebih baik bagi tuntutan terpinda tersebut. Di dalam tuntutan terpinda plaintif, plaintif memplid bahawa: (a) surat

tersebut telah dibaca oleh setiausaha akhbar plaintif ('OBS') dan setiausaha peribadi kanan plaintif ('LLC') ('perenggan 5.1(iva)'); (b) defendan telah menyebabkan atau sebaliknya memudahkan penerbitan surat tersebut kepada pelbagai surat khabar ('perenggan 5.1(v)'); (c) defendan telah menyebabkan atau memudahkan penerbitan surat tersebut pada laman web Internet 'Malaysiakini.com' ('perenggan 5.1(vi)'); (d) defendan, ejen-ejen dan/atau pengkhidmat-pengkhidmat beliau telah bercakap dengan wartawan-wartawan daripada pelbagai akhbar berhubung dengan surat tersebut ('perenggan 5.1(vii)'); (e) surat tersebut telah dikirimkan dan diterbitkan di dalam akhbar dua hari sebelum mesyuarat agong tahunan Malaysian Chinese Association ('perenggan 9(b)'); (f) dakwaan-dakwaan di dalam surat tersebut berusia empat tahun dan telah lama ('perenggan 9(g)'); dan (g) defendan telah bertindak secara melulu dan tanpa sikap prihatin mengenai kebenaran dakwaan-dakwaan yang bersifat memfitnah di dalam surat tersebut atau tidak menentusahkan arahan-arahan daripada anakguam tersebut yang telah pun lari meninggalkan negara untuk mengelakkan penyiasatan dan pertuduhan oleh pihak-pihak berkuasa yang relevan ('perenggan 10(c)'). Butir-butir yang dipohon oleh defendan adalah: (a) berhubung perenggan 5.1(iva), butir-butir mengenai orang yang telah membenarkan OBS dan LLC membaca surat tersebut; (b) berhubung perenggan-perenggan 5.1(v) dan 5.1(vi), masa dan tempat setiap satu penerbitannya, bagaimana dan macam mana defendan didakwa telah menyebabkan atau membantu di dalam penerbitan surat tersebut dan identiti mereka-mereka kepada siapa surat tersebut telah diedarkan dan diterbitkan; (c) berhubung perenggan 5.1(vii), wartawan-wartawan yang defendan, ejen-ejen dan pengkhidmat-pengkhidmatnya telah bercakap dengan dan identiti ejen-ejen dan/atau pengkhidmat-pengkhidmat defendan; (d) berhubung perenggan 9(b), orang melalui siapa dan kepada siapa surat tersebut telah dikirimkan; (e) berhubung dengan 9(g), orang yang telah membuat dakwaan-dakwaan tersebut empat tahun yang lalu; dan (f) berhubung perenggan 10(c), pertuduhan yang telah atau mungkin dibawa terhadap anakguam tersebut.

Diputuskan:

(1) Prinsip-prinsip yang menguasai permohonan untuk memperolehi butir-butir adalah butir-butir hanya boleh dipohon bagi perkara-perkara yang berbangkit daripada pliding dan budi bicara sama ada untuk memberikan satu perintah mengenai butir-butir terletak pada mahkamah. Tambahan pula, butir-butir tidak akan secara umumnya diperintahkan berhubung dengan perkara-perkara keterangan atau inferens yang dibuat atau untuk menggantikan interogatori (lihat ms 286H, 287A).

(2) Butir-butir yang dipohon oleh plaintif yang berhubung perenggan 4 pembelaan terpinda tersebut adalah perkara-perkara keterangan untuk defendan kemukakan bagi menunjukkan sama

ada beliau telah mengambil langkah-langkah yang wajar untuk menentusahkan arahan-arahan anakguam tersebut. Keadaan-keadaan dan alasan-alasan bagi ketiadaan anakguam dalam lingkungan bidang kuasa dan di manakah anakguam tersebut pada ketika ini tidak berkait dengan tindakan semasa. Sehubungan itu, permohonan plaintif untuk butir-butir berhubung dengan perenggan 4 pembelaan terpinda tersebut telah ditolak (lihat ms 287F–G).

(3) Butir-butir yang dipohon oleh plaintif berhubung perenggan 6(a) dan 6(b) pembelaan terpinda semula tidak terkandung di dalam lingkungan perlindungan undang-undang dan profesional seperti mana yang diperuntukan di bawah s 126 Akta Keterangan 1950. Butir-butir yang dipohon di bawah kedua-dua perenggan tersebut adalah relevan dengan isu penentusahan kebenaran surat tuntutan dengan anakguam. Oleh yang demikian, defendan telah diperintahkan supaya memberikan plaintif butir-butir yang dipohon di bawahnya (lihat ms 288G, 289C–D).

(4) Berhubung butir-butir yang dipohon di bawah perenggan 6(h) pembelaan terpinda semula tersebut, defendan bersedia untuk memberikan alamat dan nombor faksimili ke mana surat tersebut telah dikirimkan. Perlindungan profesional undang-undang hanya merangkumi perhubungan bagi tujuan mendapatkan nasihat undang-undang. Ia terhad kepada maklumat untuk mendapatkan dan kandungan sebarang nasihat undang-undang tetapi tidak merangkumi perkara-perkara yang dipatuhi oleh peguamcara tersebut dalam tempoh usaha melaksanakan perkhidmatannya. Sehubungan itu, perlindungan profesional undang-undang tidak merangkumi tarikh dan cara arahan anakguam tersebut (lihat ms p 289H, 290A–B).

(5) Butir-butir yang dipohon berhubung dengan perenggan 6(1) pembelaan terpinda semula tersebut tidak relevan kepada isu di sini dan persoalan mengenai bagaimana dan daripada siapa defendan telah perolehi maklumat tersebut adalah perkara keterangan untuk defendan kemukakan di perbicaraan (lihat ms 290F-G).

(6) Butir-butir yang dipohon di bawah perenggan 5.1(iva) tuntutan plaintif tidak berbangkit daripada perkara yang diplid tetapi daripada penegasan defendan sendiri. Oleh yang demikian permohonan defendan untuk butir-butir yang berbangkit di bawah perenggan 5.1(iva) tuntutan terpinda tersebut tidak dibenarkan (lihat ms 291E–F).

(7) Defendan tersebut tidak berhak kepada butir-butir yang dipohon di bawah perenggan 5.1(v) tuntutan terpinda tersebut. Di dalam pembelaan terpinda semula, defendan tidak menafikan penerbitan tersebut di dalam akhbar-akhbar kecuali bahawa beliau tidak mengetahui bahawa surat atau rencana berita berhubung dengannya akan diterbitkan secara bercetak atau

melalui media elektronik. Daripada pliding-pliding tersebut, adalah jelas bahawa penerbitan tersebut telah berlaku dan defendan mengakui bahawa beliau telah menulis surat tersebut. Adalah suatu perkara keterangan bagaimana surat tersebut sampai kepada akhbar-akhbar yang berkenaan dan bukan untuk plaintif memberikan butir-butir berhubung dengannya (lihat ms 292A–B).

(8) Berhubung dengan butir-butir yang dipohon di bawah perenggan 5.1(vi) tuntutan plaintif, masa dan tempat pengedaran adalah perkara-perkara keterangan dan oleh itu plaintif tidak perlu memberikan butir-butir tersebut. Defendan tidak menafikan bahawa beliau telah menulis surat tersebut, pertikaiannya berhubung dengan bagaimana surat tersebut diterbitkan di 'Malaysiakini.com'. Sekali lagi, ini adalah perkara keterangan. Oleh yang demikian, permohonan defendan mengenai perkara-perkara yang dibangkitkan di bawah perenggan 5.1(vi) tidak dibenarkan (lihat ms 293G, 294D).

(9) Sejauh mana pliding plaintif di dalam perenggan 5.1(vii) berkaitan dengan ejen-ejen atau pengkhidmat-pengkhidmat defendan, plaintif sepatutnya memberikan butir-butir ejen-ejen atau pengkhidmat-pengkhidmat tersebut dan wartawan-wartawan bagi akhbar-akhbar masing-masing kerana adalah satu tugas yang sukar bagi defendan menyediakan pembelaannya tanpa mengetahui siapakah sebenarnya pengkhidmat-pengkhidmat atau ejen-ejen tersebut dan wartawan-wartawan yang mereka didakwa telah bercakap dengan (lihat ms 294H–I).

(10) Butir-butir yang dipohon berhubung dengan perenggan 9(b) tuntutan plaintif adalah tidak relevan bagi tujuan perenggan 9(b) kerana fakta-fakta yang diplid di dalamnya hanya untuk menyokong tuntutan plaintif untuk gantirugi teladan (lihat ms 295G–H).

(11) Berhubung butir-butir yang dipohon di bawah perenggan 9(g) tuntutan terpinda tersebut, oleh kerana plaintif telah membangkitkan perkara itu di dalam plidingnya, adalah adil untuk plaintif memberikan butir-butir tersebut yang diminta untuk membolehkan defendan menyediakan kes beliau (lihat ms 296C–D).

(12) Butir-butir yang dipohon oleh defendan berhubung dengan perenggan 10(c) adalah sungguh relevan kepada isu kebolehpercayaan anakguam tersebut. Jika anakguam tersebut telah pada hakikatnya meninggalkan negeri untuk mengelakkan penyiasatan, defendan seharusnya lebih berhemat dalam mengambil tindakan atas arahan-arahan dari anakguam tersebut. Ini adalah relevan kepada isu sama ada defendan telah dalam keadaan tersebut bertindak secara melulu atau tanpa sebarang hemat (lihat ms 296H–I).]

A **Notes**

For cases on application for further and better particulars, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4133–4134.

For a case on communication between solicitor and client, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1642.

B

Cases referred to

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497 (refd)

Dato' V Kanalingam v Tommy Thomas [1997] 5 MLJ 229 (refd)

C *Lazarus v Deutsche Lufthansa AG* [1985] 1 NSWLR 188 (refd)

Russel & Anor v Stubbs Ltd [1913] 2 KB 200 (refd)

Skrine & Co v MBf Capital & Anor [1998] 3 MLJ 649 (refd)

Tan Hoe Kock v Ali Akarbara bin Mangudin & Ors [1997] 4 MLJ 311 (refd)

D *Theaker v Richardson* [1962] 1 All ER 229 (refd)

Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [2000] 5 MLJ 465 (refd)

Zainudin bin Muhammad v NEC System Integration Construction Ltd [2000] 6 MLJ 763 (refd)

E

Legislation referred to

Evidence Act 1950 s 126(1)

Rules of the High Court 1980 O 18 r 12(3)

Supreme Court Practice 1997 Vol 1

F

RR Sethu (*RR Sethu*) for the plaintiff.

Porres P Royan (*Michael Lum* with him) (*Shook Lin & Bok*) for the defendant.

G **Arifin Zakaria J**: The plaintiff, at all material times, is the Minister of Transport in the Government of Malaysia. He is the elected member of Parliament for Labis Parliamentary constituency. He is also the President of the Malaysian Chinese Association ('MCA'), a political party, which is a component of the Barisan Nasional, the ruling party in this country since independence. The defendant is at all material times an advocate and H solicitor practising under the name of Krish Maniam & Co.

The defendant claims that at all material times he was acting for and representing one Dato' Soh Chee Wen ('the client').

The claim herein arose out of the letter dated 13 June 2000 ('the said letter') written by the defendant addressed to the plaintiff. The contents of I the letters were published in various newspapers in the country on 14 June 2000. It is not in dispute that the day in question was a public holiday and one day prior to the delegates conference of the MCA.

Application for particulars

Arising from the respective pleadings, the parties herein applied for further and better particulars pursuant to O 18 r 12(3) of the Rules of the High Court 1980 ('the RHC'). The pleadings currently before the court are:

(a) the amended statement of claim;

(b) the re-amended defence; and

(c) the plaintiff's reply.

The principles governing particulars

At the outset, it is necessary to state the functions of particulars. This is comprehensively set out in the *Supreme Court Practice* (1997, Vol 1) at p 308 which reads:

> The function of particulars is accordingly:
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> (1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved (per Lindley LJ in *Duke & Sons v Wisden Co* (1897) 77 LT 67 at p 68, per Buckley LL in *Young (G & W) & Co Ltd v Scottish Union & National Insc Co* (1907) 24 TLR 73 at p 74, *Aga Khan v Times Publishing Co* [1924] 1 KB 675 at p 679);
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> (2) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at p 413, *Thomson v Birkley* (1882) 31 WR 230);
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> (3) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per Cotton LJ ibid; per Jessel MR in *Thorp v Holdsworth* (1876) 3 Ch D 637 at p 639; *Elkington v London Association for the Protection of Trade* (1911) 27 TLR 329 at p 330);
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> (4) to limit the generality of the pleadings (per Thesiger LJ in *Saunders v Jones* (1877) 7 Ch D 435) or of the claim or the evidence (*Milbank v Milbank* [1900] 1 Ch 376 at p 385);
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> (5) to limit and define the issues to be tried, and as to which discovery is required (*Yorkshire Provident Life Assurance Co v Gilbert and Rivington* [1895] 2 QB 148; per Vaughan Williams LJ in *Milbank v Milbank* [1900] 1 Ch 376 ; 385);
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> (6) to tie the hands of the party so that he cannot without leave go into any matters not included (per Brett LJ in *Philipps v Philipps* (1878) 4 QBD 127 p 133; *Woolley v Broad* [1892] 2 QB 317) — 'All material facts' para 18/7/10: and *Wooley v Broad* [1892] 2 QB 317). But if the opponent omits to ask for particulars, evidence may be given which supports any material allegation in the pleadings (*Dean of Chester v Smelting Corp* [1902] WN 5; *Hewson v Cleeve* (1904) 2 Ir R 536).

It may be necessary to state in general terms the principles governing particulars. Firstly, particulars may only be sought of matters arising from the pleadings. Secondly, it is a matter of discretion of the court whether to grant an order of particulars (see *Dato' V Kanalingam v Tommy Thomas* [1997] 5 MLJ 229, *Tan Hoe Kock v Ali Akarbara bin Mangudin & Ors* [1997] 4 MLJ 311). Finally, it should be emphasized that particulars would

not generally be ordered in respect of matters of evidence or inference drawn or substitute interrogatories (see *Dato' V Kanalingam v Tommy Thomas*).

Guided by the above principles, I shall now proceed to consider the applications before me.

The plaintiff's application (encl 20)

The plaintiff applies for further and better particulars of the amended defence in regard to the following:

(a) under para 4

The plaintiff seeks three particulars under this paragraph:

(i) the date when the client left the jurisdiction;

(ii) circumstances and reasons why the client had left the jurisdiction;

(iii) the present address of the client.

The plaintiff contends that these particulars are relevant to show how the defendant, as solicitor, took instructions and verified (or was able to verify) the instructions so taken. The plaintiff contends that these are relevant to the issue of the defendant's malice and recklessness. In his affidavit in reply, encl (22), the defendant stated that he has no knowledge of the matters sought by the plaintiff. It is further submitted that the particulars sought have no bearing or relevance to the facts or issues in this case. Finally, it is submitted by the defendant that the particulars sought are matters of evidence to which particulars the plaintiff is not entitled.

Even accepting the position that the defendant owes a duty to verify the truth of the client's instruction as submitted by the plaintiff, however, I agree with the defendant's submission that the particulars sought for are matters of evidence for the defendant to adduce to show whether he had taken reasonable steps to verify the instruction given by his client. I also fail to see how the circumstances and reasons for the client's absence from jurisdiction and the client's present whereabouts have any relevance to the present action.

As was stated by the Court of Appeal in *Skrine & Co v MBf Capital & Anor* [1998] 3 MLJ 649 at p 664:

> At the heart of the dispute between parties lies the well established principle that governs the law of particulars in the field of practice and procedure. It is this. *A litigant is entitled to have from his opponent, particulars of facts relevant to the issues at stake in order to prevent surprise, but he is not entitled to have his opponent's evidence.*
>
> The second defendant contends that the aforesaid request under para 9 of the amended reply is fact based. The plaintiffs say that it relates to evidence. Whether it is of the one class or the other depends upon the application of the principle to the particular facts of each case ...
>
> (Emphasis added.)

For the above reasons, I rejected the plaintiff's application for particulars under para 4. A

(b) Under para 6(a) and 6(b)

The particulars sought under paras 6(a) and (b) of the re-amended defence relate to: B

(i) the date and mode of the instructions; and

(ii) the location of the client at the time of the alleged conversation/ instructions.

The plaintiff contends that the date and mode of the instructions are important to the verification of the truth of the contents of the letter of demand vis a vis the plaintiff. It is further contended that the date of instruction, lapse of time and distance (of the client's location) are relevant to the question of verification. The defendant's answer to this is that the particulars sought under these paragraphs are covered by legal professional privilege as they relate to communications made between the defendant and client in the course and for the purpose of the defendant's employment. The defendant relies specifically on s 126(1) of the Evidence Act 1950 ('the Act') which reads as follows: C D

> No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: E
>
> Provided that nothing in this section shall protect from disclosure F
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

The defendant submits the words 'any communication' in s 126(1) of the Act includes time, date, mode, manner, etc of such communication. No authority was submitted by the defendant to support this contention. Having considered this issue, I agree with the submission of counsel for the plaintiff that particulars sought in para 6(a), and (b) do not come within the ambit of legal and professional privilege as provided in s 126 of the Act. As stated by Suzanne B McNicol in the book *Law of Privilege* (1992 Ed) at p 97: G H

> Legal professional privilege only applies to communications. It will not, therefore, prevent the disclosure of facts observed or discovered by either party in the course of their relationship as client and legal adviser. As Parke B stated in *Dwyer v Collins*, 'the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them'. The 'observed facts' I

exception highlights the limits of the doctrine of legal professional privilege, for, as Heerey J stated in *National Crime Authority v S*, legal professional privilege 'does not depend on some notion that the lawyer's knowledge becomes the property of his client'. This means that any facts which a legal adviser would have ascertained in any event, irrespective of professional skill and irrespective of a confidential communication with the client, will not be privileged. For example, the client's name and address are facts which are often not communicated confidentially to the legal adviser. Similarly, facts such as the client's handwriting, the client's mental capacity, the existence of a retainer between the legal adviser and client and the fact that the client put in pleadings and swore an affidavit have all been held within the exeption to legal professional privilege. Furthermore, it appears that any information which is communicated other than by oral or written means is not protected by the privilege. As Martin B said in *Brown v Foster*, privilege does not attach to 'matters which the counsel sees within his eyes'. This necessarily entails that personalty, chattels or any other type of physical object, other than documents, cannot be protected by the privilege.

Further, I find the particulars sought for under these two paragraphs are relevant to the issue of verification of the truth of the letter of demand with the client. I therefore ordered that the defendant do furnish to the plaintiff the particulars sought for under paras 6(a) and (b) of the re-amended defence as prayed for by the plaintiff.

(c) Under para 6(h) of re-amended defence

In para 6(h) of the re-amended defence, the defendant pleaded that 'A copy of the said letter was transmitted by facsimile to the said client, as instructed by him, from the defendant's office'.

The plaintiff now seeks the address and telephone number of the facsimile to which the letter was transmitted on 13 June 2000 and the date and mode of client's instruction to do so.

Relying on *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [2000] 5 MLJ 465 at p 491, the learned counsel for the plaintiff contended that to transmit a letter by facsimile where it can be read by a third person, is publication for the purpose of the law of defamation. (There, though the Court of Appeal reversed James Foong J's decision on the facts of that case, it did so on the ground that the communication was from one firm of solicitors to another in pending litigation and therefore it was privileged.) The case of *Zainudin bin Muhammad v NEC System Integration Construction Ltd* [2000] 6 MLJ 763 would support the same point. In para 7 of his affidavit in reply, the defendant stated he is prepared to give the address of the client's office to which the said letter was sent and the facsimile number to which the said letter was transmitted. The defendant, however, claims privilege from furnishing the particulars of the date and mode of the client's instruction. The learned counsel for the defendant in his submission contended that the particulars in respect of the date and mode of the client's instruction in para (b) of encl (17) is covered by legal professional privilege under s 126 of the Act as they relate to communications made between the defendant and the said client in the

course of and for the purpose of the defendant's employment as the said client's advocate. However, I agree with learned counsel for the plaintiff that legal professional privilege only extends to communications for the purpose of seeking legal advice. It is limited to the information for, and content of any legal advice and it does not extend to matters observed by solicitor in the course of his retainer. This is, I think, in line with the provisions of s 126 of the Act. For the above reasons, I am of the view that the privilege does not extend to the date and mode of the client's instructions. Accordingly, I ordered that particulars be given in respect of matters as prayed in prayer 1(4)(a), (b) and (c) of encl (20).

(d) Under para 6(1) of the re-amended defence

In para 6(1), the defendant pleaded that the defendant had been informed that one Lee Chai Huat had published the said letter to the various newspaper. The plaintiff in encl (20) seeks, the following particulars:

(i) identify the source of the alleged information or the informant;

(ii) state the date of receipt of the alleged information;

(iii) state the position, status and relationship of the said Lee Chai Huat to the client.

The plaintiff's counsel contended that the particulars are relevant and essential as it would enable the plaintiff to prepare his case and also to tie down the defendant to a definite story.

For the defendant it is submitted that the particulars sought herein are irrelevant to the facts in issue and further or alternatively, the particulars sought are matters of evidence to which the plaintiff is not entitled to particulars of. The defendant submitted that what is relevant to para 6(1) is whether or not Lee Chai Huat published the said letter to the various newspapers. On the pleading the defendant need only to prove the same and not who told the defendant that Lee Chai Huat published the said letter.

Going by the pleading I agree with the defendant that the particulars sought for are irrelevant to the issue herein and the question of how or from whom the defendant obtained the information is a matter of evidence for the defendant to adduce at the trial. For those reason I dismissed the plaintiff's application in prayer 1(5)(a), (b) and (c) of encl (20).

The defendant's application (encl 24)

The defendant applies for further and better particulars of the amended claim in regard to the following:

(a) Under para 5.1(iva) amended claim

In the said paragraph the plaintiff pleaded that:

> One Oong Boon See, the press secretary of the plaintiff and Lee Leck Cheng, the senior private secretary of the plaintiff, who in the ordinary course of

A business read the said letter and the defendant well knew or ought reasonably to know the letter would and intending the said letter should be so opened and read;

The defendant is seeking the following particulars:

State who allowed or permitted the said Oong Boon See and the said Lee Leck B Cheng to read the said letter.

The defendant submitted that the letter was not addressed to the two named persons so the defendant is entitled to know who allowed them to read the said letter. The plaintiff contended that nowhere it is pleaded in para 5.1(iva) that both Oong Boon See and Lee Leck Cheng were permitted C to read and hence the particulars sought do not really arise out of a matter pleaded in the amended claim — if anything the plaintiff contended the defendant is in fact seeking particulars arising out of his own averment since in para 6(f) of the re-amended defence the defendant states that:

The defendant has no knowledge that the said Oong Boon See or the said Lee D Leck Cheng or any other person read the said letter or that the said letter would be or ought to be read by the said person (except with leave or licence of the plaintiff).

The plaintiff submitted that the plantiff's averment is not founded on leave, licence or permission. The plaintiff further submitted that based on the case of *Theaker v Richardson* [1962] 1 All ER 229 it is sufficient basis for E publication in the law of libel if third parties happen to read a letter in ordinary course of business.

I agree with the submission of the plaintiff that the particulars sought under para 5.1(iva) do not arise out of matter pleaded by the plaintiff but rather out of the defendant's own averment. The plaintiff's case is that the F said letter was read by Oong Boon See and Lee Leck Cheng in the ordinary course of business having regard to their position in the plaintiff's office. For the above reasons I rejected the defendant's application for particulars arising under para 5.1 (iva) of the amended claim.

(b) Under para 5.1(v) of the amended claim

G

In para 5.1(v) of the amended claim the plaintiff alleges that the defendant caused, authorized or otherwise assisted or facilitated the circulation and publication of the said letter to various newspapers. The defendant is seeking the following particulars under the said paragraph:

H (i) the date, time and place of each circulation and publication thereof;

(ii) how and by what way the defendant is alleged to have caused, authorized or otherwise assisted or facilitated in the circulation and publication of the said letter; and

(iii) identities of the person or persons to whom the said letter is alleged to I have been circulated to and published.

The plaintiff's case is that the said letter was published in the various newspapers on 14 and 15 June 2000. The defendant in the re-amended

defence did not deny the said publication in the newspapers except that he did not know and/or had no reason to know that the said letter or news features in respect thereof would be published in the print or electronic media. From the pleading it is obvious when the publication had taken place and the defendant had admitted that he had written the said letter. I think it is a matter of evidence as to how the letter got into the hand of newspapers concerned and it is certainly not for the plaintiff to furnish particulars thereof. The defendant seeks to rely on what was said by Hunt J in *Lazarus v Deutsche Lufthansa AG* [1985] 1 NSWLR 188 at pp 191–192 that:

> The plaintiff should also have given in his statement of claim particulars of the identity of the persons to whom the publication is alleged to have been made. The identity of those persons (either general or precise) is of vital importance to a defendant in almost every defamation action, whether the publication was oral or in writing. In both cases, the defence of qualified privilege will depend upon the defendant being able to establish that those persons to whom he is alleged to have published the matter complained of had a legitimate interest in the matter so published.

However, those remarks may be applicable to that particular case because there the alleged defamatory words were made orally in an aircraft. Unlike in the present case where the plaintiff is relying on the written document and the press report. As a matter of fact the same learned judge in pp 192–193 also stated:

> On the other hand, the newspaper defendant in a written defamation case could hardly require the plaintiff to identify the readers of its newspaper. In this category, I include radio and television station defendants and their listeners and viewers respectively. This is not, as it is sometimes suggested, because the identity of the readers, listeners or viewers is a matter already within the defendant's knowledge, it is because the defendant does not have to meet any case based upon the precise identity of its readers, nor does it need to know that precise identity for any purpose in relation to its own defence. The plaintiff in his case will be relying upon the width or the unrestricted nature of the publication, not upon the precise identity of the persons to whom it was made, and similarly the defendants will stand or fall in relation to his defences upon the width of the publication and not upon the precise identity of the persons to whom it was made. There are, however, cases where a plaintiff will be ordered to give particulars identifying the persons to whom the publication is alleged to have been made, even in a newspaper case. In *Fullam v Newcastle Chronicle and Journal Ltd*, the plaintiff was ordered to give particulars of the persons to whom the matter complained of was published who also had knowledge of the extrinsic facts upon which he relied in order to give to the matter complained of the secondary or extended meaning for which he contended as a true innuendo. That case was, of course, a somewhat special one in the light of the extraordinary extrinsic facts identified by the plaintiff, but it is not an isolated example: see also *Grappelli v Derek Bloch (Holdings) Ltd* [1981] 1 WLR 822 at pp 826, 829–830; [1981] 2 All ER 272 at pp 275, 278.

And at p 193 he said further:

> Such cases support the rule, as I have sought to express it, that, in both oral and written defamation cases, particulars should be supplied of the identity of

A the persons to whom the publication is alleged to have been made when that identity is relevant to either the plaintiff's or the defendant's case. That identity will usually be relevant in oral defamation cases and in written defamation cases where it was not published in the mass media; but that identity will not usually be relevant in mass media cases.

B With regard to details of publication in libel, *Gatley on Libel and Slander* (9th Ed) at p 649 stated thus:

> The General principle demands only that the defendant be given due notice of the case he has to meet, and there is no fixed rule as to what amounts to a sufficient averment of publication. However, unless there are good grounds for variance, the statement of claim should allege, in respect of each
C publication relied on as a cause of action, that the words were published by the defendant on a specific occasion to a named person or persons other than the plaintiff. Where the publication complained of is in a newspaper, book or other publication 'to the world at large', the plaintiff is not expected to plead particular acts of publication, the court accepting that publication in such cases is to be inferred.

D In the circumstances I hold that the defendant is not entitled to the particulars sought for under para 5.1.(v) of the amended claim.

(c) Under para 5.1(vi) of the amended claim.

E In the said paragraph the plaintiff pleaded that —

> (iv) the defendant caused, authorized or otherwise assisted and facilitated in the publication of the said letter (and the defamatory words therein) on the internet webside of *Malaysiakini.com* and intending and causing the said letter (and the defamatory words therein) to be read (and indeed read) by the world at large;

F The defendant now seeks particulars of:

(i) the date, time and place of each circulation and publication thereof:

(ii) how and by what way the defendant is alleged to have caused, authorized or otherwise assisted and facilitated the circulation and
G publication of the said letter; and

(iii) identities of the person or persons to which the said letter is alleged to have been circulated to and published.

As for the date, time and place of circulation I think these are matters of
H evidence and therefore no particulars need to be given by the plaintiff. As for particulars sought for in (b) and (c) above, again the defendant did not deny that he had written the said letter, the only dispute is as to how the letter got to be published on *Malaysiakini.com* This is also a matter of evidence. The defendant ought to know whether he had played any part in the publication of the said letter on the electronic media. It is for him to
I answer the plaintiff's allegation. As was observed Sir Gorell Barnes, President of the Court of Appeal in *Russel & Anor v Stubbs Ltd* [1913] 2 KB 200 at p 203:

> They (the defendants) must know perfectly well whether they have published this alleged libel, and to whom, if any one, they have published it, and the allegations in the latter part of para 4 of the statement of claim can present no difficulty or embarrassment to the defendants in framing their defence. They may say that they did not publish the report to any one or that they did publish it and it is true, or that they only published it to persons on occasions which made it a privileged communication. I cannot see that the defendants will have any difficulty whatever in meeting the plaintiffs' case ...

In that case para 4 of the statement of claim reads:

> The persons to whom the said libel was published are the following — One Staniforth and a company called Milestone & Staniforth, Ld, and some clerk or employee of the said company, whose names are unknown to the plaintiffs. The plaintiffs believe that the said libel was published to some other persons whom they cannot specify, but they will rely upon the publication thereof to every person to whom they may discover it was published.

The defendants sought particulars of the persons to whom the libel complained of is alleged to have been published, giving the names, addresses of such person or persons, and the date or dates of such publication or publications and how and in what manner published. The Court of Appeal in that case confirmed the decision of the Master in rejecting the said application by the defendants. Similarly here the defendant's application for particulars on matters arising under para 5.1 (vi) ought to be rejected for the same reasons.

(d) Under para 5.1(vii) of the amended claim

The plaintiff in para 5.1(vii) pleaded as follows:

> the defendant, his agents and/or servants had on 13 June 2000 spoken to the reporters of New Straits Times, Sin Chew Jit Poh, the Sun and Nanyang Siang Pau confirming and repeating the contents of the said letter (and the defamatory words therein).

The defendant seeks the following particulars:

(a) reporters of the said newspapers who had spoken to on 13 June 2000 by the defendant, his agent and/or servant;

(b) the identities of the defendant's servants and/or agent;

(c) the words used by the defendant, his agents and/or servants to the respective reporters.

I am of the opinion that in so far as the pleading relates to the defendant's agents or servants the plaintiff properly ought to give particulars of the agents or servants and the reporters of the respective newspapers. I have come to this conclusion on the premise that it would be a difficult task for the defendant to prepare his defence without knowing who his servants or agents were and the reporters to whom they were alleged to have spoken to. Particulars, however, need not be given in so far as it involved the plaintiff himself because he ought to have known to whom he had spoken to or if none at all then he could deny the same. I am supported in this by the view

A expressed by Grove J in *Bradbury v Cooper* (1883) 12 QBD 94 at p 95 when he said:

> In this case if the slanders complained of had been alleged to have been uttered by the defendant himself I should have had much doubt whether he could compel the plaintiff to give the particulars asked for. I am not satisfied that the modern practice has been to order particulars of the names of the persons to whom the slanders were uttered. Where the defendant is alleged to have uttered them himself he may be supposed to know to whom he did utter them. In old days it was no doubt the rule that where the plaintiff claimed special damage by reason of the slander having been uttered to particular persons, he must give the names of those persons. However I give no opinion upon the question which would arise if the defendant was accused of having uttered the words himself. But the present is a different and an unusual case. The words are said to have been uttered by Timson 'at the request and by the direction of the defendant,' and particulars are asked of the persons to whom Timson uttered them. The defendant cannot tell where or under what circumstances Timson uttered the words, and may therefore come to trial in entire ignorance of the persons to whom they were uttered, and unprepared to meet the case made against him. He might not be able to call Timson, and could not meet the plaintiff's claim for damages — whether general or special — without knowing to whom Timson was alleged to have uttered the slanders complained of. This case, therefore, is unlike any cited before us in argument. I am of opinion, that the defendant is entitled to the particulars he asks for, and that the order of the judge at chambers should be affirmed.

E On the above I therefore direct that the plaintiff do give particulars prayed for in para 4(a), (b) & (c) of encl (24) in so far as it relates to the defendant's agents and/or servants.

(e) Under para 9(b) of the amended claim

F In para 9(b) of the amended claim the plaintiff alleges that:

> the said letter was sent and published in the press during a public holiday (Prophet Muhammad's birthday), ie 15 June 2000 and two days before the Annual General Meeting of the Malaysian Chinese Association which meeting was already sufficiently advertised and well-known before the said letter was sent; ... .

G The defendant seeks the following particulars:

> State by and to whom was the said letters sent.

In this regard I agree with the plaintiff's submission that the particulars sought for here is irrelevant for the purpose of para 9(b) as the facts pleaded H in the said paragraph is only to support the plaintiff's claim for exemplary damages. For that reason I would reject the defendant's application in para 5 of the encl 24.

(f) Under para 9(g) of amended claim

I In para 9(g) the plaintiff alleges that:

> the allegations in the letter, on the face of the contents, were four years old and stale; ... .

The defendant seeks the following particulars: A

(a) state who made the allegations four years ago;

(b) state where and to whom were the allegations made.

The plaintiff contended that the pleading here relates to exemplary damages and like aggravated damages it need not be pleaded (see *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497). The fact B that it is pleaded, he contended, does not entitle party to particulars of it. The plaintiff in his affidavit affirmed on 12 October 2000 (encl 27) stated in para 13.1 that the period should be two years not four years and this had been clarified in para 3.2(a) of his reply. In para 13.3 he said further that his solicitors had already notified that these allegations had appeared on the C internet sites namely *freemalaysia.com* and *Malaysia.net/sangkancil* and raised by opposition members of Parliament, such as Mr Lim Guan Eng on 19 December 1996 and Mr Lim Kit Siang on 14 July 1998 in the Dewan Rakyat. In this regard, I am of the opinion that since the plaintiff had raised the matter in his pleading therefore it is just fair for the plaintiff to provide the particulars asked for to enable the defendant to prepare his case. The D particulars in question may be evidential in nature but nonetheless I think it is important to the defendant in order to answer the plaintiff's claim for exemplary damages. I, therefore, ordered that particulars be given as prayed for in para 6 of encl (24).

E

(g) Under para 10(c) of amended claim

In para 10(c) the plaintiff claims that:

> the defendant had acted recklessly and without caring for the truth of the defamatory allegations in the said letter or unverified instructions from the said Soh Chee Wan who has fled the country to avoid investigation and F charges by the relevant authorities aforesaid.

The defendant seeks the following particulars:

(a) state what is the said Soh Chee Wen being investigated for;

(b) state what charges have been or are being prepared against the said Soh G Chee Wen;

The plaintiff in his affidavit in reply states that the particulars sought for are irrelevant. He also contended that the defendant, more than anyone else ought to know the reason for absence of client.

In my opinion the particulars sought by the defendant is highly relevant H to issue of the credibility of the client. If the client had in fact fled the country to avoid investigations and charges by the relevant authorities as alleged by the plaintiff, the defendant ought therefore to exercise more care in acting on the instruction of the client. To me this is relevant to the issue of whether the defendant had in the circumstances acted recklessly or without caring. I do not think it is open to the plaintiff to simply respond by I saying that the defendant ought to know better. It was the plaintiff who made those assertions therefore it is necessary for the plaintiff to provide

particulars thereof. I, therefore, ordered that the plaintiff do furnish the particulars as prayed in para 7 of encl (24).

Order accordingly.

Reported by Lim Lee Na